NO. 21390

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONNIE ARNOLD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

The appellant, Ronnie Arnold, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on January 12, 1966. The indictment was brought under 18 U.S.C. Section 2113(a) and charged that the appellant, along with Renee Thelma Meyers, by force and violence and by intimidation, knowingly and wilfully took from Sue Beaulieu $659.00 belonging to, and in the care, custody, control, management and possession of the Security First National Bank, Walnut Park Branch.

The case proceeded to trial before the Honorable Irving Hill on February 14, 1966, and was concluded on February 16, 1966. The Court found appellant guilty as charged in the indictment [C. T. 13]. 1/

On March 11, 1966, appellant was sentenced to 20 years, the maximum period as prescribed by law, and for a study pursuant to 18 U. S. C. Section 4208(c) [C. T. 13]. On June 28, 1966, appellant's sentence was modified and appellant was sentenced under the Federal Youth Corrections Act, 18 U. S. C. Section 5010(c), for a period of eight years or until discharged by the Federal Youth Correction Division of the Board of Parole as provided in 18 U. S. C. Section 5017(d) [C. T. 14].

Appellant's Notice of Appeal was timely filed on March 18, 1966 [C. T. 15].

The jurisdiction of the District Court was based upon Title 18 U. S. C. Section 2113(a), Title 18, U. S. C. Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction pursuant to Title 28, U. S. C. Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

The indictment was brought under 18 U. S. C. Section

1/ "C. T." refers to Clerk's Transcript of Record.

2113(a), which provides in pertinent part as follows:

> "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank or any savings and loan association . . . .
>
> " . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

18 U.S.C. Section 2 provides:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, indices, or procures its commission, is a principal."

III

QUESTIONS PRESENTED

A. Was There Sufficient Probable Cause to Sustain Appellant's Initial Detention and Subsequent Arrest?

B. Were Appellant's Statements Properly Admitted Into Evidence?

C. Was the Evidence Sufficient to Sustain Appellant's

Conviction?

D. Was a Common Plan or Scheme Established?

E. Was the Cross-Examination of Renee Jackson Proper?

IV

STATEMENT OF FACTS

On November 4, 1965, the Security First National Bank, Walnut Park Branch, was robbed of $659.00. Just prior to the robbery, at about 12:00 noon, the Operations Officer of the bank, Edward Baker, exited the bank via the rear door and observed a male negro, later identified as the appellant, walking through the alley behind the bank [R. T. 39]. 2/ Approximately 5 minutes thereafter Mr. Baker observed appellant enter the front door of the bank and speak to one of the tellers. Appellant was then observed walking across the lobby towards the new accounts department [R. T. 42].

Appellant approached the new accounts teller Ina Yokley and asked to open a new account [R. T. 86]. Mrs. Yokley handed appellant a card and asked him to sign his name and fill in certain information. Appellant asked Mrs. Yokley whether he could fill in the card at the center counter; Mrs. Yokley requested that he fill in the card in her presence. Appellant proceeded to write his

---

2/ "R. T." refers to Reporter's Transcript.

name very slowly and in a nervous manner [R. T. 87]. The process consumed a long time because appellant did not write all the time. He turned around and looked to his left [R. T. 88]. Appellant then stated that he had spoiled the first card and requested another. Mrs. Yokley then handed the appellant another signature card and he started to fill in this second card [R. T. 88, 89].

While appellant was talking with Mrs. Yokley, Renee Thelma Jackson entered the bank. As Renee Jackson walked through the bank to the window of teller Sue Beaulieu, she saw appellant and recognized him [R. T. 177, 178]. She then proceeded to hand teller Sue Beaulieu a demand note which stated in part:

"any mistake youl die first bieeing watched"

The teller proceeded to hand Renee Meyers $659.00, whereupon Mrs. Meyers hurriedly exited the bank via the front door. At just about the same time that Renee Meyers was exiting the bank, Mrs. Yokley told appellant that he could not open an account without identification. Appellant said "Okay", and walked out the front door of the bank approximately one and one-half minutes after Renee Meyers had exited [R. T. 89, 94]. During the course of appellant's transactions with Mrs. Yokley, he never completed filling in either of the signature cards [R. T. 89]. Appellant signed the same name to both cards: "Ronald Jones." [R. T. 90].

As Renee Meyers exited the bank Mr. Baker was made aware that a robbery had just occurred and he proceeded to sound the alarm. Thereafter he chased Renee Meyers out of the bank. Mr. Baker saw Renee Meyers apprehended around the corner from

the bank. He then returned to the bank and while inside had a brief conversation with a bank customer, Mrs. Black [R. T. 110]. Mrs. Black told Mr. Baker that "There's another one in the bank" [R. T. 43]. Thereafter Mr. Baker saw appellant walking in front of the bank towards the corner where a crowd had gathered [R. T. 43]. Appellant was standing among the crowd when Mr. Baker approached Officer Crawford and stated "that there was another one that could possibly be implicated" [R. T. 43]. Mr. Baker then pointed out the appellant to Officer Crawford [R. T. 127]. Officer Crawford asked Mr. Baker to walk up to appellant and point to him again which Mr. Baker proceeded to do [R. T. 133].

Appellant was standing in the crowd that had gathered and was leaning over peering through the crowd with his hands in his pockets [R. T. 134]. Officer Crawford asked appellant to take his hands out of his pockets. Appellant was then asked to walk away from the crowd, which he did. Officer Crawford then asked appellant what he was doing in the bank. Appellant's reply was "What bank?" [R. T. 135]. Officer Crawford then asked appellant what he was doing in town, to which appellant said "nothing". . At this point Officer Crawford began to pat down the appellant; first Officer Crawford patted appellant's back pockets and then his jacket pockets [R. T. 1352. At this time another officer walked over and stood behind appellant [R. T. 136]. As Officer Crawford bent down and was patting the outside of appellant's jacket pocket he observed a large bulge underneath appellant's pants just beneath the belt line. He patted the bulge and felt something hard [R. T.

136]. Officer Crawford then told the other officer "It's a gun", at which point the other officer grabbed appellant's arms [R. T. 136]. Officer Crawford then extracted a fully loaded .38 caliber revolver from inside appellant's pants. Prior to patting the bulge in appellant's pants, Officer Crawford's hands never entered appellant's pockets.

At approximately 1:30 P. M. on the date of the robbery Special Agent Richard Burris of the F. B. I. interviewed appellant [R. T. 184]. After advising appellant of his constitutional rights Agent Burris asked appellant if he had seen the girl who had been arrested at the bank. Appellant replied that he had. Agent Burris then asked appellant if he had ever seen the girl or known her before. Appellant stated that he had never seen the girl before in his life [R. T. 187]. During the trial it was proved that appellant was friendly with Renee Meyers' husband and brother-in-law and that appellant had known Renee Meyers prior to the bank robbery [R. T. 169].

A.

THERE WAS SUFFICIENT PROBABLE CAUSE FOR APPELLANT'S INITIAL DETENTION AND SUBSEQUENT ARREST.

1. A Detention For Questioning is Not An Arrest.

In the case at bar, the arresting officer was a local police

officer, therefore, to determine what constitutes a detention and an arrest, we must look to California law. United States v. Di Re, 332 U. S. 581 (1947); Johnson v. United States, 333 U. S. 10, 15 (1947).

Under California law an arrest, " . . . is taking a person into custody, in a case and in a manner authorized by law". California Penal Code, Section 834.

Appellant in the case at bar is in the same position as was the petitioner in Davis v. California, 341 F. 2d 982, 986 (9th Cir. 1965), when he was twice pointed out by Mr. Baker and told by Officer Crawford to leave the crowd and to take his hands out of his pockets:

> "He was temporarily restrained prior to that time, not for the purpose of taking him into custody, but to interrogate him. This was not an arrest." [under California law.] Id. at p. 986.

When Officer Crawford first approached appellant, it was not to arrest him but merely to ask him some general questions concerning his presence in the bank and connections, if any, with Renee Jackson.

2. The Initial Detention of Appellant Was Valid and Supported by Good Cause.

At the time that Officer Crawford first talked to appellant,

he had been told by Mr. Baker that "there was another one that could possibly be implicated". Mr. Baker then twice pointed to appellant. If Officer Crawford had failed at least to question appellant at this time he would not have been fully responding to the mandate of his duties. See Frye v. United States, 315 F. 2d 493 (9th Cir. 1960).

That a brief detention period under these circumstances is valid is well settled law. This Circuit has recently held in Wilson v. Porter, 361 F. 2d 412, 415 (9th Cir. 1966) that:

> "We take it as settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigation."
>
> " . . . due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their actions. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing."

Cf. United States v. Vita, 294 F. 2d 524, 529 (2nd Cir. 1961).

Finally, this Court's most recent expression on the subject of a detention period substantiates the validity of Officer Crawford's actions. In Jesse James Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966) this Court stated:

> "Substantial considerations favor the recognition of a carefully limited right of brief police detention on less than probable cause to believe the person detained has committed a felony."

3. The Seizure of the Gun From Appellant and His Arrest Were Valid As a Substantially Contemporaneous Arrest and Search.

It would appear that the first time that appellant was actually "taken into custody" was at the moment when Officer Crawford said to the officer standing behind appellant "it's a gun" [R. T. 136] and appellant's arms were grabbed from behild. The officer's action at that moment should be considered a "taking into custody" within the meaning of Section 834 of the California Penal Code. Thus, it would seem as though appellant was placed under arrest at the exact moment that the loaded .38 revolver was first found.

If this Court should find that the "arrest" of appellant and the seizure of the gun occurred at a substantially contemporaneous point in time there should be no difficulty in upholding the validity of the seizure. This Court has already held in Cipres v. United States, 343 F. 2d 95 98 (9th Cir. 1965), that:

" . . . a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure."

The Government would urge this Court to uphold a substantially contemporaneous search where the circumstances indicate that a search of a suspect is necessary for the safety of the inquiring officers. It is to be noted that Officer Crawford's pat search of appellant was only a precautionary weapon search, not a search for contraband.

Appellant cites Mosco v. United States, 301 F. 2d 180, 187 (9th Cir. 1962) for the proposition that Federal law requires that an arrest precede a search. In fact, Mosco supports the proposition that a substantially contemporaneous search and arrest may be upheld. In Mosco officers went to Mosco's apartment to place him under arrest. Not finding Mosco in the apartment they proceeded to conduct a search. Thereafter, Mosco arrived and was placed under arrest. The officers, upon entering the apartment and conducting the search did not anticipate Mosco's return. In invalidating the search of Mosco's apartment this Court considered the California cases which hold that "when a person is available for immediate arrest at the place of the search, the fact that the search preceded the technical arrest is immaterial". Mosco v.

United States, supra, at p. 188. Judge Barnes then stated:

> "But assuming this rule may properly be embraced by federal court with regard to the search of premises, it does not sanction a search made before the individual is available for arrest. As before stated, policy reasons which support the rule are not present in those circumstances." Id. at p. 188.

In the case at bar appellant was present and available for arrest at the time he was searched. The policy reasons Judge Barnes referred to, i. e. necessity and the safety of the arresting officers were present in this case. It is submitted that far from invalidating Officer Crawford's actions, Mosco v. United States, supra, is authority upholding his actions.

Finally, the Supreme Court has specifically refused to reach the question of whether the Constitution requires that an arrest precede a search. Ker v. California, 374 U.S. 23, 42, 43 (1963).

However, the exact moment of arrest and search should not be determinative of this appeal. The Government most respectfully urges this Court to judge the overall reasonableness of the officer's actions relative to appellant. If, under all of the circumstances heretofore stated, Officer Crawford acted reasonably in detaining and questioning appellant after he had been pointed out by Mr. Baker as a possible suspect then the exact moment of arrest

should not be dispositive. The standard to be applied in determining whether a search was valid is one of reasonableness. United States v. Rabinowitz, 339 U.S. 56 (1950).

B.

THE STATEMENTS MADE BY APPELLANT TO LOCAL POLICE OFFICERS AND THE F. B. I. WERE ADMISSIBLE.

Upon first confronting appellant Officer Crawford asked him what he was doing in the bank. Appellant replied "what bank" [R. T. 135]. Officer Crawford then asked appellant what he was doing in town. Appellant responded "nothing" [R. T. 135]. This form of preliminary questioning has recently been upheld by this Court in Cotton v. United States, No. 20, 986, decided January 23, 1967.

> "He was confronted with a set of highly suspicious circumstances, and it was entirely proper for him to ask Cotton what he was doing there and for identification." [p. 7 of slip sheet opinion.]

Appellant attacks the admissibility of his statement made to the F. B. I. subsequent to his arrest at the Huntington Park Police Department. Since appellant received a proper constitutional admonition by Agent Burris prior to making the statement it should be admissible unless invalidated because of its being the

result of an illegal arrest. As heretofore argued, the Government contends that appellant's arrest was valid, therefore the statement was admissible.

C.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION

On appeal from a judgment of conviction the Court of Appeals is required to draw all of the favorable permissible inferences to sustain the verdict. Glasser v. United States, 315 U.S. 60 (1942); Byrnes v. United States, 327 F.2d 825, 830 (9th Cir. 1964).

In a criminal case based upon circumstantial evidence the test to be applied in deciding whether the evidence is sufficient to sustain a judgment of conviction is whether reasonable minds could find that the evidence excludes every hypothesis but that of guilt.

Holland v. United States, 348 U.S. 121, 139-140 (1954);

Strangway v. United States, 312 F.2d 283, 285 (9th Cir. 1963), cert. denied, 373 U.S. 903.

However, in the case at bar there is a substantial amount of direct evidence upon which Judge Hill based his verdict. The following direct evidence was introduced against appellant:

1. Just prior to the robbery appellant was seen by Mr. Baker walking through the alley behind the bank [R. T. 39].

2. Appellant was inside the bank at the time of the

robbery ostensibly for the purpose of opening a new account [R. T. 86].

3. Appellant was observed writing false names on the new account cards in a nervous manner [R. T. 87].

4. During the time that appellant was filling out the new account cards he was seen turning around and looking to his left, in the direction of Renee Jackson [R. T. 88].

5. When Renee Jackson entered the bank she saw appellant and recognized him [R. T. 177, 178].

6. The demand note handed to teller Sue Beaulieu by Renee Jackson stated, "bieeing watched" [Exhibit 1 in evidence].

7. When appellant was arrested he was found to be in possession of a fully loaded .38 caliber revolver [R. T. 136].

8. When questioned by the F. B. I. appellant stated that he had never seen Renee Jackson before in his life [R. T. 187].

When appellant entered the bank he could have had but one of two purposes; to assist Renee Jackson in robbing the bank if his help became necessary, or to open a new bank account. All of appellant's conduct while he was inside the bank indicates that he had no intention of opening a new account. On two separate new account cards appellant filled in false names. While filling in the cards appellant appeared nervous and continued looking in the direction of Renee Jackson. Prior to filling in the cards appellant asked to use the center desk, from where he could have had a clearer view of Renee Jackson.

In Nye & Nissen v. United States, 336 U. S. 613, 619 (1949),

the Supreme Court stated that in order to aid and abet another to commit a crime a defendant must associate himself with the criminal venture and that he must seek by his action to make it succeed.

This Court has recently held in Ramirez v. United States, 263 F. 2d 33, 35 (9th Cir. 1966), that knowledge that a crime was to be committed and presence at the scene is insufficient evidence upon which to rest a judgment of conviction.

> "We find in the record no action, by word or act, on the part of appellant to make the crime succeed except appellant's knowledge that a crime was to be committed, and that he was present at the scene."

However, it appears from the above-quoted language that if there had been any action, by word or act on the part of appellant to make the crime succeed the conviction could have been sustained. In the case at bar the record clearly indicates that there were actions taken by appellant to assure the successful completion of the robbery. Appellant entered the bank prior to Renee Jackson armed with a loaded .38 caliber pistol. During the robbery appellant kept Renee Jackson under surveillance.

The mere fact that Renee Jackson did not need appellant's help while she was inside the bank does not negate the fact that appellant was present inside the bank with a loaded pistol to ensure a successful robbery.

The Second Circuit Court of Appeals has recently stated that this silent assistance toward the successful commission of a crime may be sufficient evidence upon which to base a conviction.

> "It is true, . . . that evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime . . . .
>
> "Participation may be proved by circumstantial evidence . . . .
>
> "There may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought 'by his action to make it succeed' -- for example, the attendance of a 250 pound bruiser at a shakedown as a companion to the extortionist, or the maintenance at the scene of crime of someone useful as a lookout." (Emphasis added).
>
> United States v. Garguilo, 310 F. 2d 249, 253 (2nd Cir. 1962).

The Supreme Court has recognized that the presence of a defendant at the scene of a crime without any action by him may constitute aiding and abetting if there is evidence that the defendant had a purpose to aid but failed to act because such action was unnecessary. Furthermore, it must be shown that the presence of the defendant was pursuant to an understanding. Hicks v. United

States, 150 U.S. 442, 450 (1893).

In the case at bar there is evidence from which this Court can reasonably infer that there was an understanding or agreement between appellant and Renee Jackson to rob the bank. Renee Jackson testified that when she first entered the bank she saw appellant and recognized him. During the robbery appellant appeared nervous and looked toward Renee Jackson. The demand note presented to the teller stated "bieeing watched". At the trial it was proved that appellant and Renee Jackson knew each other previously.

The case at bar is just such a case where the appellant had a purpose to aid the robbery but failed to do so only because any action on his part was unnecessary.

D.

GOVERNMENT'S EXHIBIT NO. 1 WAS PROPERLY ADMITTED INTO EVIDENCE.

Government's exhibit number one contains a declaration in furtherance of a common plan or conspiracy to rob the bank in question. Before this declaration could be admitted into evidence against appellant there must have been independent evidence that a common plan or conspiracy existed. Judge Hill admitted Government's exhibit number one into evidence subject to a motion to strike if the Government failed to establish this common plan or conspiracy by independent evidence. At the close of the Govern-

ment's case a motion to strike was made which motion was denied [R. T. 192]. Therefore, Judge Hill found that independent of the demand note itself there was sufficient evidence that a common plan existed.

Independent of the demand note the following evidence of a common plan or scheme existed:

1. When Renee Jackson entered the bank she saw and recognized appellant [R. T. 177, 178].

2. Appellant looked toward Renee Jackson while she was robbing the bank [R. T. 88].

3. Appellant knew Renee Jackson prior to the robbery.

4. Appellant carried a loaded .38 caliber pistol. The question of whether there was sufficient independent evidence of a common plan or conspiracy to admit the hearsay statement contained in the demand note against the appellant was a question for the trier of fact - Judge Hill - his ruling was based upon sufficient evidence.

E.

THE CROSS-EXAMINATION OF RENEE JACKSON WAS PROPER.

1. If a Witness Gives a Statement to Federal Agents and Then Attempts to Retract That Statement On the Witness Stand the Witness May Be Cross-Examined.

If a witness gives a statement to the F. B. I. and later

attempts to change that statement in a material way which will be detrimental to the Government cross-examination of that witness should be permitted. See Bushaw v. United States, 353 F. 2d 477 (9th Cir. 1965).

In Weaver v. United States, 216 F. 2d 23, 25 (9th Cir. 1954), a witness originally gave a statement to the F. B. I. Later the witness attempted to change his story in front of the grand jury. In sustaining the Government's claim of surprise and allowing the witness to be taken on cross-examination the Ninth Circuit held:

> "The defense claimed there was no surprise because the witness had refused to testify in accordance with the previous story to government agents when she was before the Grand Jury. The Government, however, had a right to anticipate that, under oath, and in court, she would testify in accordance with her story to the Federal Bureau of Investigation."

Likewise, in the case at bar, the Government was justified in anticipating that, under oath and in court, Renee Jackson would testify in accordance with her original statement to the F. B. I.

Furthermore, the Government was under no obligation to produce any witness to establish that Renee Jackson had made prior contradictory statements since she admitted making the contradictory statements as may be seen from the following excerpt from her testimony:

> "Q. BY MR. GLASSMAN: Mrs. Jackson,

you do know the defendant Ronnie Arnold, don't you?

"A. Not know him like you would know somebody, no.

"Q. Have you seen him prior to November 4, 1965?

"A. Not other than here, other than court.

"THE COURT: Just a minute.

Are you acquainted with this defendant Arnold?

"THE WITNESS: He knows my brother-in-law and my husband. Other than that, no.

"THE COURT: The question is, do you know him?

"THE WITNESS: No, not -- I haven't had anything to do with him. No. No.

"THE COURT: Had you ever met him prior to seeing him in the criminal prosecution in which you were involved and in which he is now involved?

"THE WITNESS: Oh, before then?

"THE COURT: Yes.

"THE WITNESS: Well, around the house, my mother-in-law's house, or the neighborhood.

"THE COURT: You seen him at your mother-in-law's house?

"THE WITNESS: He came to see Roland.

"THE COURT: Pardon?

"THE WITNESS: He came to see Roland.

"THE COURT: Who is that?

"THE WITNESS: My brother-in-law.

"THE COURT: Go ahead.

"Q. BY MR. GLASSMAN: Mrs. Jackson, after you were arrested, for the bank robbery in question, were you made aware of the fact that Ronnie Arnold had also been arrested: You saw someone arrest him, didn't you?

"A. Yes.

"MR. TARLOW: Object, your Honor. Compound question.

"THE COURT: That is a group of questions. One at a time.

"MR. GLASSMAN: Pardon me, your Honor.

"Q. Were you made aware of the fact that Ronnie Arnold was also arrested?

"A. Yes, sir.

"Q. After this time you gave a statement to Special Agent George Aiken of the FBI, didn't you?

"A. After this time?

"Q. After you were arrested did you not then give a statement?

"A. I talked to them. I didn't give a statement.

"Q. But you did speak to him?

"A. Yes.

"Q. And you told him certain things relative to this bank robbery, didn't you?

"A. I told him what I had done.

"Q. At this time you were advised of all of your constitutional rights, weren't you?

"A. Just what I had said could be used against me?

"Q. That's right.

"A. Yes.

"Q. And when you had this conversation with Agent Aiken, at this time you knew that Ronnie Arnold had also been arrested for this bank robbery, isn't that right?

"A. Yes, I did.

"Q. And at the time that you had this conversation with Agent Aiken did you not say to him, 'I had an accomplice'?

"A. At that time?

"Q. At that time, that you were interviewed by Agent Aiken, didn't you tell him that you had an accomplice in this bank robbery?

"A. Yes.

"Q. Did you tell him that someone else had helped you plan it the night before?

"A. Yes.

"Q. Did you also tell him that someone else was going to share the money with you?

"A. Yes.

"Q. Did you tell him that an individual had gone into the bank with a loaded gun to be your back-up man?

"A. An individual -- no. Because I told him no one was with me.

"Q. You never said that the plan was for you to go into the bank unarmed and that your accomplice was to go in with a gun and to protect you?

"A. Yes.

"Q. You did say that?

"A. Yes.

"THE COURT: I don't understand. Did you say that to the FBI agent?

"THE WITNESS: Yes. He asked me -- I told him exactly what I did. He asked me did I plan it. I told him I had planned it. He asked me how I planned it, and I told him.

"THE COURT: Did you tell him you had an accomplice?

"THE WITNESS: Yes.

"THE COURT: And did you tell him your accomplice was in the bank at the same time?

"THE WITNESS: I don't remember telling him that.

"Q. BY MR. GLASSMAN: But you did tell him somebody had been there with you who was to help you, is that correct?

"A. Yes.

"Q. And you told him you had planned it the night before and you were going to share the money?

"A. Yes.

"Q. Isn't it a fact that Ronnie Arnold was that man?

"A. No.

"Q. At the time you made this statement you have just told us you knew he was arrested, isn't that correct?

"A. I did.

"Q. And at the time you made this statement you implicated another individual, didn't you?

"A. I did."

2. When The Government Is Under An Obligation To Call a Witness Because The Witness Has Knowledge Of a Crime, It May Impeach The Witness.

It was formerly the rule that a party could not impeach its own witness, on the theory that the party certified to the witness' honesty. However, both courts and commentators have repudiated the rule because it unduly restricts a court's fundamental objective -- to seek and find truth. Even assuming that there was ever any validity to the reason underlying the rule, the reason disappears when the government is forced to call persons who have knowledge of a crime. Obviously, as in the case at bar, such witnesses will after be friends, even accomplices of the defendant. The Ninth

Circuit has recognized this, holding that "the prosecution in a criminal case may impeach a witness whom it is under a legal duty or obligation to call, such as an available witness to the crime. . . . "

Weeks v. United States, 179 F. 2d 319, 321 (9th Cir. 1950).

See also, Stevens v. United States, 256 F. 2d 619, 622-623 (9th Cir. 1958),

Cf., United States v. Freeman, 302 F. 2d 347, 350 (2nd Cir. 1962), cert. den. 375 U.S. 958 (1963).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Arnold should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman

ANTHONY MICHAEL GLASSMAN
Assistant U. S. Attorney